82-953

No.

Office - Supreme Court, U.S.
FILED
DEC 8 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

TANDY CORPORATION,
*Intervenor/Appellant,*

v.

UNITED STATES OF AMERICA,

and

WESTERN ELECTRIC COMPANY, INC., AND
AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
*Appellees.*

**On Appeal From The United States District Court For The District Of Columbia**

## JURISDICTIONAL STATEMENT

MALCOLM R. PFUNDER, *Counsel of Record*
NEAL M. GOLDBERG
JOHN T. MASTERSON, JR.
JANET E. PITTERLE

HAMEL, PARK, MCCABE & SAUNDERS
888 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 835-8000

GEORGE A. KUHNREICH
Tandy Corporation
One Tandy Center
Fort Worth, Texas 76102
*Counsel for Intervenor/Appellant*

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

## QUESTIONS PRESENTED

1. Was the elimination of defendant AT&T's outstanding compulsory patent licensing obligations approved by the District Court without sufficient basis in the record and contrary to the public interest?

2. Was the failure to require that the consent decree proposed by the Department of Justice and defendant AT&T be modified to provide for divestiture of the Bell retail outlets (Phone Center Stores) to the local telephone operating companies contrary to the public interest?

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## JURISDICTIONAL STATEMENT

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Intervenor/appellant Tandy Corporation[1] appeals from a final judgment of the United States District Court for the District of Columbia approving a consent decree pro-

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[1] Hereinafter referred to as "Tandy." A listing of all parent companies, subsidiaries and affiliates of Tandy, as required by Rule 28.1, appears on the first page of the Application of Tandy Corporation for an Extension of Time in which to Docket Appeal from the United States District Court for the District of Columbia, filed with this Court on November 17, 1982.

posed by the United States Department of Justice and defendants American Telephone and Telegraph Company (AT&T) et al.[2] Tandy argued in the District Court that the "public interest" standard of the Antitrust Procedures and Penalties Act required modification of the proposed consent decree (1) to retain AT&T's compulsory patent licensing obligations under the 1956 *Western Electric* consent decree and (2) to include divestiture of AT&T's Phone Center Store assets to the telephone operating companies.

## OPINIONS BELOW

The opinion of the District Court, issued on August 11, 1982, is reported at 34 Fed.R.Serv.2d 991 (D.D.C.) and is reproduced in the Joint Appendix (hereinafter cited as J.A.),[3] pp. 1-172. The District Court's order modifying the Final Judgment originally entered on January 24, 1956,[4] was filed on August 24, 1982, is reported at 1982-2 Trade Cas. ¶ 64,900 (D.D.C.) and is reproduced in the Joint Appendix, pp. 173-90.[5] The District Court's dis-

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[2] In addition to the parties listed in the caption of the case in this Court, the District Court granted intervenor status to numerous parties, which are listed in the District Court's Order of August 26, 1982, reproduced in the Joint Appendix hereto, at pp. 191-94.

[3] Tandy Corporation has joined with several states and state public utility commissions in submitting a Joint Appendix, which is separately bound and is incorporated by reference herein.

[4] The Final Judgment of the District Court for the District of New Jersey, entered on January 24, 1956, is reported at 1956 Trade Cas. ¶ 68,246 and is reproduced in the Appendix hereto, pp. 2a-19a.

[5] The District Court's order entered on August 23, 1982, denying the government's request for reconsideration of the portion of its opinion of August 11, 1982, relating to customer premises equipment marketing is reported at 1982-2 Trade Cas. ¶ 64,980 (D.D.C.) and is reproduced in the Joint Appendix hereto, pp. 195-200.

missal order entered August 24, 1982, is reported at 1982-2 Trade Cas. ¶ 64,981 (D.D.C.).

The District Court's order granting intervenor status, entered on August 26, 1982, is not reported but is reproduced in the Joint Appendix, pp. 191-94. The District Court's order entered on November 10, 1982, certifying this case for direct appeal pursuant to the Expediting Act is not reported but is reproduced in the Joint Appendix, pp. 204-08.[6]

## JURISDICTION

This appeal is taken from a final judgment entered in the United States District Court for the District of Columbia approving a consent decree that modifies the 1956 Final Judgment in the *Western Electric* case and settles an action brought by the Government in 1974 in the District Court for the District of Columbia under Section 2 of the Sherman Act, 15 U.S.C. § 2. The District Court's opinion was issued on August 11, 1982. (J.A. at 1). The Order modifying the 1956 Final Judgment in the *Western Electric* case was filed on August 24, 1982. (J.A. at 173). Tandy Corporation was granted Intervenor status by the District Court's Order of August 26, 1982, (J.A. at 191) and filed a timely Notice of Appeal in the United States District Court for the District of Columbia on November 3, 1982. (J.A. at 227). On November 10, 1982, the District Court entered an Order certifying a direct appeal to this Court pursuant to the Expediting Act, 15 U.S.C. § 29(b). (J.A. at 204). Federal jurisdiction is based upon 28 U.S.C. § 1337, and the jurisdiction of this Court is invoked under 15 U.S.C. § 29(b).

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[6] In addition, the District Court's denial of defendants' motion to dismiss on September 11, 1981, is reported at 524 F.Supp. 1336 (D.D.C. 1981).

## STATUTES INVOLVED

The Expediting Act, 15 U.S.C. § 29, as amended, provides in pertinent part:

> (b) Direct appeals to Supreme Court
>
> An appeal from a final judgment pursuant to subsection (a) of this section shall lie directly to the Supreme Court, if, upon application of a party filed within fifteen days of the filing of a notice of appeal, the district judge who adjudicated the case enters an order stating that immediate consideration of the appeal by the Supreme Court is of general public importance in the administration of justice. Such order shall be filed within thirty days after the filing of a notice of appeal. When such an order is filed, the appeal and any cross appeal shall be docketed in the time and manner prescribed by the rules of the Supreme Court. The Supreme Court shall thereupon either (1) dispose of the appeal and any cross appeal in the same manner as any other direct appeal authorized by law, or (2) in its discretion, deny the direct appeal and remand the case to the court of appeals, which shall then have jurisdiction to hear and determine the same as if the appeal and any cross appeal therein had been docketed in the court of appeals in the first instance pursuant to subsection (a) of this section.

The Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h), (the Tunney Act) provides in pertinent part:

> (e) Public interest determination
>
> Before entering any consent judgment proposed by the United States under this section, the court shall determine that the entry of such judgment is in the public interest. For the purpose of such determination, the court may consider—
>
> (1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief

sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;

(2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

(f) Procedure for public interest determination

In making its determination under subsection (e) of this section, the court may—

(1) take testimony of Government officials or experts or such other expert witnesses, upon motion of any party or participant or upon its own motion, as the court may deem appropriate;

(2) appoint a special master and such outside consultants or expert witnesses as the court may deem appropriate; and request and obtain the views, evaluations, or advice of any individual, group or agency of government with respect to any aspects of the proposed judgment or the effect of such judgment, in such manner as the court deems appropriate;

(3) authorize full or limited participation in proceedings before the court by interested persons or agencies, including appearance amicus curiae, intervention as a party pursuant to the Federal Rules of Civil Procedure, examination of witnesses or documentary materials, or participation in any other manner and extent which serves the public interest as the court may deem appropriate;

(4) review any comments including any objections filed with the United States under subsection (d) of this section concerning the proposed judgment and the responses of the United States to such comments and objections; and

(5) take such other action in the public interest as the court may deem appropriate.

Section 2 of the Sherman Act, 15 U.S.C. § 2, as amended, provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

## STATEMENT OF THE CASE

On January 24, 1956, the District Court for the District of New Jersey approved a proposed consent decree between AT&T and the Department of Justice, putting an end to a case that had begun in 1949 with the filing of a complaint by the Government against AT&T and its subsidiary the Western Electric Company, Inc. *United States* v. *Western Electric Co.*, Civil Action No. 17-49 (the *Western Electric* case).[7] That complaint alleged that the defendants had monopolized and conspired to restrain trade in the manufacture, distribution, sale and installation of telephones, telephone apparatus, equipment, materials and supplies, in violation of Sections 1, 2 and 3 of the Sherman Act. 15 U.S.C. §§ 1, 2 and 3. Among the provisions of the 1956 consent decree were a prohibition on AT&T's engaging in any business other than the provision of common carrier communications services, and a requirement that the defendants license their patents to all applicants upon the payment of appropriate royalties, or in some cases royalty-free. *United States* v. *Western Electric Co.*, 1956 Trade Cas. ¶ 68,246 (D.N.J.).

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[7] The *Western Electric* case was subsequently transferred to the District Court for the District of Columbia and assigned a new docket number (C.A. No. 82-0192).

On November 20, 1974, the Department of Justice filed another antitrust suit against AT&T, Western Electric and Bell Telephone Laboratories, Inc., alleging monopolization of telecommunications services and equipment in violation of Section 2 of the Sherman Act. *United States* v. *American Telephone and Telegraph Co. et al.*, Civil Action No. 74-1698 (D.D.C.) (the *AT&T* case.) Trial began in January, 1981. Following conclusion of the Government's case, the Court denied defendants' motion to dismiss the action. *United States* v. *American Telephone and Telegraph Co.*, 524 F.Supp. 1336 (D.D.C. 1981). On January 8, 1982, with the defendants having presented virtually their entire case, the parties advised the Court they had reached an agreement on a proposed decree.

Rather than "settling" the *AT&T* case, which they had been litigating since 1974, the parties sought a dismissal of that case and simultaneously filed a "Modification of Final Judgment" with the District Court for the District of New Jersey, which was to replace the *Western Electric* decree with an entirely new decree. On January 11, 1982, the District Court for the District of New Jersey approved the proposed Modification. Subsequently, on motion of the parties, the New Jersey Court transferred the *Western Electric* action to the Court hearing the *AT&T* case, and the latter vacated the January 11 Order approving the proposed Modification. By agreement of the parties, the District Court ordered that procedures equivalent to those required by the Tunney Act, 15 U.S.C. § 16(b)-(h), be applied to the proposed settlement.[8]

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[8] The parties initially took the position that the Tunney Act did not apply to modifications of existing decrees.

The proposed settlement required the divestiture of the twenty-two Bell Operating Companies (BOC's) from AT&T and limited the BOC's to providing local telephone exchange service. The divested BOC's were not permitted under that proposal to manufacture or market telecommunications products or customer premises equipment (CPE), or to provide interexchange services, directory advertising such as the Yellow Pages, information services, or any other product or service which is not a "natural monopoly service actually regulated by tariff." The proposed Modification also eliminated the mandatory patent licensing provisions imposed on AT&T by the 1956 decree.

In furtherance of its review of the proposed decree, the Court solicited comments from interested persons. Over 600 comments were received. In its Comments, Tandy urged, *inter alia*, that (1) the BOC's should be permitted to sell, but not manufacture, CPE; (2) the AT&T retail outlets (the Bell Phone Center Stores) should be among the assets to be divested by AT&T and thereafter controlled by the BOC's; and (3) the compulsory patent licensing provisions of the 1956 decree should be retained. *Comments of Tandy Corporation* (filed April 20, 1982).

Following review of the comments submitted by Tandy and other interested parties, and responses from AT&T and the Department of Justice, the Court on May 25, 1982, specified a number of issues for further briefing. Among the issues it raised were the absence of restrictions on AT&T, the restrictions proposed for the divested BOC's, and the appropriate division of assets between AT&T and the divested BOC's. Tandy filed briefs addressing most of the issues it had discussed in its Comments, once again urging, *inter alia*, that the BOC's be

permitted to sell, but not manufacture, CPE[9] and that the compulsory patent licensing provisions of the 1956 decree be retained.[10]

On June 17, 1982, the Court scheduled oral argument on the issues specified in the Court's May 25 Order. Counsel for Tandy was designated one of the lead counsel on the issue regarding "Restrictions on Bell Operating Companies." At that hearing, held June 29, 1982, Counsel for Tandy reiterated the arguments regarding the CPE issue Tandy had previously raised in its filings. (Oral Argument Transcript at 25169-25178).

In its August 11, 1982, opinion the Court determined that the proposed decree would satisfy the Tunney Act's public interest standard if AT&T and the Justice Department would agree to several specified changes. One of the changes the Court required would permit the divested BOC's to provide, but not manufacture, CPE. (slip op. at 176, J.A. at 170). Despite its insistence on this change, the Court rejected the suggestion that the AT&T Phone Center Stores be divested to the BOC's. (slip op. at 111 n. 248, J.A. at 108). With respect to patent licensing, the Court concluded that the elimination of the 1956 decree's patent licensing provisions was "not inconsistent with the public interest." (slip op. at 82, J.A. at 79). Finally, the Court indicated that it would grant intervenor status to those who previously had filed requests or motions to intervene. (slip op. at 164, J.A. at 159).

On August 19, 1982, the Court denied the Government's request that it reconsider its position regarding

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[9] Brief of Tandy Corporation Concerning Restrictions and Demands on the Bell Operating Companies (filed June 14, 1982).

[10] Brief of Tandy Corporation Regarding Absence of Restrictions on AT&T (filed June 14, 1982).

the BOCs' participation in the CPE market. (J.A. at 195). The parties then submitted a proposed decree incorporating the Court's required changes and on August 24, 1982, the Court entered the amended Modification of Final Judgment, vacated the provisions of the 1956 consent decree and ordered the *AT&T* case dismissed. (J.A. at 173). On August 26, 1982, it granted intervenor status to numerous parties, including Tandy Corporation.[11] Several intervenors, including Tandy, filed timely Notices of Appeal in the U.S. District Court for the District of Columbia. On November 10, 1982, in response to motions filed by the United States and three intervenors pursuant to the Expediting Act, 15 U.S.C. § 29(b), the District Court certified that the "immediate consideration of the appeals taken herein by the Supreme Court is of general public importance in the administration of justice." (J.A. at 207). On November 19, 1982, Chief Justice Burger granted an extension of time until December 8, 1982, for the filing of Tandy's Jurisdictional Statement.

## THE QUESTIONS ARE SUBSTANTIAL

The matter before the Court concerns the settlement of one of the largest federal antitrust cases in history, against the world's largest corporation, AT&T. This appeal raises serious issues about an important and frequently used tool of antitrust enforcement—the consent decree—and the role of the federal judiciary in ensuring that such decrees are in the public interest. The specific consent decree at issue here has enormous implications for Tandy as a competitor of Western Electric in the sale of CPE, for other competitors of AT&T,

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[11] Intervenors were granted limited rights, including the right to appeal from the Court's approval of the proposed settlement. *See* J.A. at 193-94.

and for all who use and rely upon telecommunications services, facilities and equipment. The consent decree will have a dramatic impact on the American telecommunications and electronics industries and will, in turn, likely affect a variety of consumer welfare, national defense and foreign trade interests. Tandy could not agree more with the District Court's statement that "[t]his is not an ordinary antitrust case." (slip op. at 32, J.A. at 33).

Under the 1974 amendments to the Expediting Act, this Court may itself conduct a plenary review of an appeal from a District Court decision, or it may remand to the Court of Appeals for such review. Plenary consideration by either the Supreme Court or the Court of Appeals is particularly appropriate and necessary since this Court has repeatedly emphasized its commitment to thorough review of the effectiveness of antitrust decrees on direct appeals pursuant to the Expediting Act. "The relief granted by a trial court in an antitrust case and brought [to the Supreme Court] on direct appeal, thus by-passing the usual appellate review, has always had the most careful scrutiny of this Court." *United States* v. *E.I. duPont de Nemours and Co.*, 366 U.S. 316, 323 (1961), quoting *International Boxing Club of New York, Inc.* v. *United States*, 358 U.S. 242, 253 (1959).

In exercising its direct review function, this Court has not treated a District Court's power to enter an antitrust decree "as one of discretion, subject only to reversal for gross abuse," but rather has "recognized 'an obligation to intervene in this most significant phase of the case' when necessary to assure that the relief will be effective." *United States* v. *Glaxo Group Limited*, 410 U.S. 52, 64 (1973), quoting *United States* v. *United States Gypsum Co.*, 340 U.S. 76, 89 (1950); *United States* v. *E.I. duPont de Nemours and Co.*, *supra*, 366 U.S. at 323.

In *United States* v. *E.I. duPont de Nemours and Co.*, *supra*, this Court articulated the reasons why direct appeal under the Expediting Act necessitates such an unusually broad review by the Court.

> Our practice reflects the situation created by the congressional authorization, under § 2 of the Expediting Act, of a direct appeal to this Court from the judgment of relief fashioned by a single judge. Congress has deliberately taken away the shield of intermediate appellate review by a Court of Appeals, and left with us alone the responsibility of affording the parties a review of his determination. This circumstance imposes a special burden upon us, for . . . "it is unthinkable that Congress has entrusted the enforcement of a statute of such far-reaching importance to the judgment of a single judge, without review of the relief granted or denied by him."

366 U.S. at 324-25, quoting *Hartford-Empire Co.* v. *United States*, 324 U.S. 570, 571 (1945) (footnotes omitted). Thus, this Court has an independent obligation to satisfy itself that a decree approved by a District Court in a Government antitrust suit effectively redresses the violations alleged in the complaint. *United States* v. *Glaxo Group Limited*, *supra*, 410 U.S. at 64. The broad standard of review employed by this Court on direct appeal is applicable to review of the consent decree in this case since, as the District Court stated in its August 11, 1982, opinion, the "decisions granting relief after a finding of liability form the most relevant yardstick for determining whether the proposed consent decree will further antitrust policies." (slip op. at 29; J.A. at 29-30).

Therefore, this Court should either give plenary consideration to the issues presented herein or remand to the Court of Appeals for full consideration of whether the terms of the consent decree are in the public interest under the Tunney Act. 15 U.S.C. § 16(e). To do otherwise

would effectively preclude thorough evaluation of the competitive effects of one of the most far-reaching and significant consent decrees in antitrust history—the type of plenary review clearly intended by Congress.

**Patent Licensing**

As part of the settlement in this case, the District Court approved elimination of certain compulsory patent licensing obligations that had been imposed upon AT&T in the 1956 *Western Electric* consent decree. Indeed, since patent licensing and patent abuse were not themselves issues in the *AT&T* case, that case was tried before the District Court on the apparent assumption that the licensing provisions of the 1956 decree would remain in place. As a result, neither party had occasion to submit evidence on those issues or to argue their merits below.

Elimination of AT&T's compulsory patent licensing obligations would have a profound impact upon competition in the manufacture and marketing of a wide range of telecommunications equipment, particularly customer premises telephone equipment. In addition, the elimination of the compulsory patent licensing provisions may seriously injure a wide variety of competitors and potential competitors of AT&T. Both the language of the Tunney Act and the fact that the proposed decree would modify the terms of an outstanding consent decree required that the District Court determine, before approving the proposed settlement, that termination of AT&T's licensing obligations was in the public interest. 15 U.S.C. § 16(e); *see* slip op. at p. 25 n. 67, J.A. at 25-26. On that crucial issue, the Government and AT&T obviously shared the burden of proof since they were the only parties to the suit.

The District Court did not have before it information sufficient to justify its determination that this modifica-

tion was consistent with the public interest. Both AT&T and the Government made a number of arguments in support of the modification, but those arguments were based entirely on theory and speculation. The Court did not assess and on the record before it could not have assessed adequately (1) the number, nature and competitive importance of existing AT&T patents and of additional patents likely to result from ongoing AT&T research; (2) the extent to which certain kinds of patents are necessary for participation by competitors in the manufacture of specific products or provision of specific services and the ability of actual and potential competitors of AT&T to obtain that technology; (3) the extent to which access to AT&T patents will continue to remain available under existing licenses and cross-licenses; (4) the impact of the 1956 decree provisions on research and development, on barriers to entry, on present competitors, and on competition in the markets for specific products and services; (5) the cost (both past and future) of compliance by AT&T with these provisions; (6) AT&T's intentions with respect to future research and development activities and to future patent licensing in this industry; and (7) the benefits to the public resulting from compulsory licensing.

In order for the District Court meaningfully to have evaluated whether elimination of the compulsory patent licensing requirements was in the public interest, it should have insisted upon thorough development of these complex and important issues in the record. Yet neither AT&T nor the Government sought to provide a detailed evidentiary basis for their joint request to relieve AT&T of its compulsory licensing obligations under the 1956 decree.

The District Court gave a number of reasons for its conclusion that the elimination of these obligations was

"not inconsistent" with the public interest, all of which were either simplified factual conclusions or speculative assumptions concerning the ways in which AT&T, its competitors and the BOC's would likely react to certain incentives which the settlement might alter. Whether these reasons were correct or incorrect cannot be determined, since a sufficient evidentiary basis for assessing such conclusions is not in the record. The Court thus lacked the necessary record on which to base the conclusions that it purported to make. This fundamental flaw in the District Court's treatment of the critically important licensing provisions of the 1956 *Western Electric* decree by itself justifies this Court's reversal.

Continuation of AT&T's compulsory patent licensing obligations is necessary for introduction of effective competition into the manufacture and marketing of CPE. Consequently, it is essential that the District Court's decision to vacate the relevant portion of the 1956 consent decree be closely scrutinized on appeal, either by the Supreme Court or by the Court of Appeals on remand under the Expediting Act. Alternatively, this Court should determine that the District Court lacked a proper basis for its conclusion and thus order that this aspect of the proposed settlement be vacated and remanded to the District Court for appropriate evidentiary hearings and further consideration.

**Phone Center Stores**

The settlement proposed by AT&T and the Justice Department included a provision barring the divested operating companies from marketing CPE. The District Court determined that this provision was not in the public interest because it was "directly anticompetitive" and because the evil which it was designed to prevent—use of regulated monopoly revenues to subsidize the sale of CPE—seemed unlikely to occur. The District Court

stated that permitting the BOC's to market CPE would instead contribute substantially to creation of a more competitive market, because the BOC's were the entities most likely to be able to provide "an effective counterbalance to AT&T's market strength and thereby to promote a genuinely competitive market." (slip op. at 112, J.A. at 109).

Although the District Court required the parties to revise their proposed settlement to permit the marketing of CPE by the BOC's, the Court failed to order one additional step which is crucial to the creation of a competitive CPE market. Under the decree approved by the District Court, AT&T will retain its Phone Center Stores, which comprise an established, effective nationwide retail distribution system for CPE. Thus the BOC's, while permitted to market CPE, must establish their own retail distribution facilities, in effect entering the retail market from scratch.

It is clear that the District Court seriously erred in permitting AT&T to retain the Phone Center Store assets. The Court found that:

> The Bell System is a vast, vertically integrated company which dominates local telecommunications, intercity telecommunications, telecommunications research, and the production and marketing of equipment. (slip op. at 101, J.A. at 98).

This finding of AT&T dominance of the CPE industry, coupled with the Court's concern that the BOC's contribute to a competitive CPE market, cannot be reconciled with the inadequate remedial measures approved by the District Court. The District Court, like the Justice Department, is apparently willing to allow AT&T's anticompetitive dominance of the CPE market to be slowly eroded over many years. In rejecting the request for

divestiture of the Phone Center Stores to the BOC's, the Court pointed only to the BOCs' "substantial retail access through their contact with the individual telephone subscribers" (slip op. at 111 n. 248, J.A. at 108) as a basis for its apparent assumption that BOC entry into CPE marketing would assure elimination or meaningful reduction of AT&T's market position.

Divestiture of the Phone Center Stores to the BOC's is essential if the decree is to have any realistic chance of providing "an effective counterbalance to AT&T's market strength." The Phone Center Stores have generated substantial customer goodwill and thus confer an overwhelming advantage upon AT&T in competing with any other CPE retailers or would-be entrants into that market. In permitting AT&T to succeed to the locations, the goodwill and the customer base of the existing Phone Center Stores, the District Court's decree places the BOC's at a substantial competitive disadvantage and may significantly delay or even deter BOC entry into that market.

The District Court correctly found that the BOC's were the entities most likely to be able to provide effective competition with AT&T. (slip op. at 112, J.A. at 109). But the BOC's have been unnecessarily handicapped by the District Court in that effort. Inclusion of a requirement in the decree that AT&T divest its Phone Center Store assets to the BOC's would eliminate that unnecessary obstacle. AT&T's massive resources, its enormous R&D capability, and its reputation for manufacturing high quality telephone equipment would permit it to re-enter CPE marketing and re-establish itself quickly as a significant, effective competitor. At the same time, the BOC's would continue AT&T's former marketing operations, and the competitive "counterbalance" sought by the District Court would be more quickly and more effectively

established. The Tunney Act's public interest standard requires further modification of the decree in this manner. It is patently contrary to the public interest to prolong unnecessarily the anticompetitive structure of the CPE market when divestiture, a traditional and widely used antitrust remedy, can readily correct the problem.

The District Court declined to modify the proposed consent decree to require divestiture of the AT&T Phone Center Stores, stating that their retention by AT&T was not anticompetitive. (slip op. at 111 n.128, J.A. at 108). In addition to reaching a conclusion that is questionable in itself, the District Court used the wrong standard in reaching that conclusion. The appropriate standard was not whether the proposed decree was anticompetitive, but whether the public interest required the more effective, procompetitive divestiture of AT&T's retail outlets in order to bring meaningful competition to CPE marketing.

Because this case comes to the Supreme Court under the Expediting Act, the Court has both the power and the responsibility to assess the effectiveness of the consent decree in creating a genuinely competitive CPE market. Where the proposed remedy is found to be inadequate, the Court should require appropriate changes in the decree, so that the resulting remedy satisfies the public interest standard of the Tunney Act. Tandy respectfully urges the Supreme Court to order such changes, to remand with directions requiring such changes, or alternatively to remand to the Court of Appeals for plenary consideration of these issues in that forum.

## CONCLUSION

Tandy Corporation seeks further modification of the Modified Final Judgment to provide for (1) reinstatement of the compulsory patent licensing provisions and (2) divestiture of the Phone Center Store assets to the Bell Operating Companies. For the reasons stated above, this Court should give plenary consideration to these issues, or alternatively, remand these issues to the Court of Appeals for appropriate review.

Respectfully submitted,

MALCOLM R. PFUNDER, *Counsel of Record*
NEAL M. GOLDBERG
JOHN T. MASTERSON, JR.
JANET E. PITTERLE

HAMEL, PARK, MCCABE & SAUNDERS
888 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 835-8000

GEORGE A. KUHNREICH
Tandy Corporation
One Tandy Center
Fort Worth, Texas 76102
*Counsel for Intervenor/Appellant*

December 8, 1982

# APPENDIX

Tandy Corporation has participated with several states and state public utility commissions in the preparation of a separately bound Joint Appendix which contains all submissions required by Rule 15.1(j) and is incorporated by reference herein. The Appendix which follows contains the 1956 Final Judgment of the District Court for the District of New Jersey.

UNITED STATES DISTRICT COURT
For The District of New Jersey

Civil Action No. 17-49.

UNITED STATES OF AMERICA,

*Plaintiff,*

v.

WESTERN ELECTRIC COMPANY, INCORPORATED, AND AMER'CAN TELEPHONE AND TELEGRAPH COMPANY,

*Defendants.*

## FINAL JUDGMENT.

Plaintiff, United States of America, having filed its complaint herein on January 14, 1949; the defendants having appeared and filed their answer to such complaint denying the substantive allegations thereof; and the parties, by their attorneys, having severally consented to the entry of this Final Judgment without trial or adjudication of any issues of fact or law herein and without this Final Judgment constituting any evidence or admission by any party in respect of any such issues;

Now, THEREFORE, before any testimony has been taken herein, and without trial or adjudication of any issue of fact or law herein, and upon the consent of all parties hereto, it is hereby

ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

I.

This Court has jurisdiction of the subject matter herein and of all the parties hereto. The complaint states a claim upon which relief may be granted against each of the defendants under Sections 1, 2 and 3 of the Act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended.

II.

For the purposes of this Final Judgment:

(a) "Western" shall mean the defendant Western Electric Company, Incorporated.

(b) "A T & T" shall mean the defendant American Telephone and Telegraph Company.

(c) "Bell Operating Companies" shall mean the 22 corporations listed in Appendix A attached to this Final Judgment, any other subsidiaries of the defendants engaged in furnishing common carrier communications services and the respective subsidiaries of and successors to each of the foregoing.

(d) "Companies of the Bell System" shall mean A T & T, Western, their subsidiaries and the Bell Operating Companies.

(e) "Westrex" shall mean Westrex Corporation, a Delaware corporation.

(f) "Patents" shall mean United States letters patent except for the reference to foreign patents in Section X (E)(3).

(g) "Bell System patents" shall mean patents owned or controlled by either of the defendants or any of their subsidiaries, and patents on inventions made in the course of their employment by employees of defendants and their subsidiaries (other than employees of subsidiaries exclusively engaged in the performance of contracts with the plaintiff) employed to do research, development or other inventive work, subject to any

releases of rights to such employees prior to the date of this Final Judgment, and shall include patents of others under which and to the extent to which either of the defendants or any of their subsidiaries may have the right to grant licenses.

(h) "Equipment" shall mean apparatus, systems, materials, supplies, machines, tools and any other product.

(i) "Common carrier communications services" shall mean communications services and facilities, other than message telegram service, the charges for which are subject to public regulation under the Communications Act of 1934, or any amendment thereof, or would be subject to such regulation thereunder if such a service or facility were furnished in interstate commerce; and shall also include any communications service or facility, other than message telegram service, the charges for which are or become subject to regulation under existing or future laws of any state, territory, or the District of Columbia, but only in the jurisdiction or jurisdictions in which the charges for such service or facility are subject to regulation.

(j) "Associated companies" shall mean, as to defendants, the Companies of the Bell System, and as to any applicant, its subsidiaries.

(k) "Person" means any individual, partnership, corporation, association, firm, trustee or other legal entity.

(l) "Message telegram service" shall mean the electrical transmission by a common carrier of a message presented to it at one of its public offices in written form or, if presented orally, reduced to written form by the carrier and delivered by the carrier to the addressee in written form or, if orally, by a reading of the written message by the carrier.

(m) "B-2 agreements" shall mean the license agreements dated July 1, 1932, made by either or both of the defendants with General Electric Company, Radio Corporation of America, and Westinghouse Electric Corporation, or any of them, and all agreements supplementary thereto, and "other parties

to the B-2 agreements" shall mean said companies, their subsidiaries, successors and assigns.

III.

The provisions of this Final Judgment, applicable to a defendant, shall be binding upon said defendant, its officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with said defendant who receive actual notice of this Final Judgment by personal service or otherwise.

IV.

(A) The defendants are each enjoined and restrained from commencing, and after three (3) years from the date of this Final Judgment from continuing, directly or indirectly, to manufacture for sale or lease any equipment which is of a type not sold or leased or intended to be sold or leased to Companies of the Bell System, for use in furnishing common carrier communications services, except equipment used in the manufacture or installation of equipment which is of a type so sold or leased or intended to be so sold or leased; provided, however, that this Section shall not apply to the artificial larynx, by-products of reclamation of scrap, or equipment manufactured for the plaintiff, or for plaintiff's prime or sub-contractors for the performance of contracts with plaintiff or sub-contracts thereunder.

(B) After three (3) years from the date of this Final Judgment, the defendant Western is enjoined and restrained from engaging, either directly or indirectly, in any business not of a character or type engaged in by Western or its subsidiaries for Companies of the Bell System, other than (1) businesses in which defendant A T & T may engage under Section V hereof, (2) businesses in which Western is required to engage under this Final Judgment, and (3) any business engaged in for the plaintiff or any agency thereof.

(C) No sale of any subsidiary or assets made necessary by this Section IV need be made otherwise than at a fair price and

on reasonable terms nor shall it be made except to a person approved by this Court. Defendants may apply to this Court for an extension of time established by this Section IV, upon notice to the plaintiff, and such extension may be granted upon a showing of good cause therefor.

V.

The defendant A T & T is enjoined and restrained from engaging, either directly, or indirectly through its subsidiaries other than Western and Western's subsidiaries, in any business other than the furnishing of common carrier communications services; provided, however, that this Section V shall not apply to (a) furnishing services or facilities for the plaintiff or any agency thereof, (b) experiments for the purpose of testing or developing new common carrier communications services, (c) furnishing circuits to other communications common carriers, (d) for a period of five (5) years from the date of this Final Judgment, leasing and maintaining facilities for private communications systems, the charges for which are not subject to public regulation, to persons who are lessees from defendants or their subsidiaries of such systems forty-five (45) days after the date of this Final Judgment, (e) directory advertising, (f) advice or assistance to other communications common carriers, or (g) businesses or services incidental to the furnishing by A T & T or such subsidiaries of common carrier communications services.

VI.

The defendants are each enjoined and restrained from making or performing, directly or indirectly, any contract or agreement with any person whereby either defendant or its subsidiaries will have any right in any territory to act as distributor of any equipment manufactured or sold by such person, or whereby such person will have any exclusive right in any territory to act as distributor of any equipment manufactured or sold by either defendant or its subsidiaries; provided, however, that this Section shall not prevent the defendants or

their subsidiaries from buying any equipment for sale or lease to, or supplying any equipment to, the defendants' associated companies or the plaintiff, or prevent Westrex and its subsidiaries from acting as distributor to sound recording studios or outside the United States, nor shall this Section be deemed to prevent the disposition in any channels of trade of any equipment originally acquired for sale to defendants' associated companies or to the plaintiff.

VII.

The defendants are each enjoined and restrained from making, performing or enforcing, directly or indirectly, any contract or agreement with any independent telephone operating company under which such company is required to buy any equipment from them (but this shall not apply to any specific purchase order or to any specific contract for the purchase of operating plant), or with any purchaser to limit, fix or control the prices to be charged by such purchaser on the resale of any equipment.

VIII.

The defendants are each enjoined and restrained from acquiring, directly or indirectly, any person engaged in the manufacture, distribution or sale of equipment useful in furnishing common carrier communications services, either by acquisition of securities thereof or by acquisition of its assets.

Nothing in this Section VIII shall be construed to prohibit:

(a) acquisition by either defendant of all or part of the securities or assets of its subsidiaries;

(b) formation of subsidiaries by either defendant and the transfer thereto of assets of either or of other subsidiaries of either;

(c) application to this Court, upon notice to the plaintiff, for permission to acquire the securities or assets of a person engaged in such manufacture, distribution or sale, which may be

granted upon a showing that the effect of such acquisition will not be substantially to lessen competition or to tend to create a monopoly.

IX.

Western is ordered and directed to maintain cost accounting methods that conform with such accounting principles as may be generally accepted and that afford a valid basis, taking into account the magnitude and complexity of the manufacturing operations involved, for determining the cost to Western of equipment sold to A T & T and Bell Operating Companies for use by them in furnishing common carrier communications services.

X.

(A) The defendants are each ordered and directed to grant or cause to be granted, to any applicant who shall make written application therefor at any time or from time to time, non-exclusive licenses under all claims of any, some or all existing and future Bell System patents to make, have made, use, lease and sell any or all equipment as desired by the applicant, such licenses (1) to be royalty-free, to persons other than the other parties to the B-2 agreements, under all Bell Systems patents (other than patents of Teletypesetter Corporation) issued prior to the date of this Final Judgment, under which licenses or sublicensing rights were exchanged between the defendants and such other parties to the B-2 agreements, (2) to be at reasonable royalties to the other parties to the B-2 agreements under the aforesaid patents, except that such licenses shall be royalty-free to any such other party during any period for which licenses granted by it to the defendants or either of them, of the scope and character which the defendants may require it to grant to them pursuant to this Section X (A), shall be royalty-free under all patents issued prior to the date of this Final Judgment under which, and to the extent to which, such other party or its associated companies may have the right to grant licenses, and (3) to be at reasonable royalties to all

persons under all other existing and future Bell System patents; but upon condition that the applicant shall grant to defendants at reasonable royalties licenses to make, have made, use, lease and sell such equipment useful in furnishing common carrier communications services and such machines, tools and materials useful in manufacturing or operating any such equipment, as defendants may then designate in writing, under all claims of any or all existing and future patents under which, and to the extent to which, the applicant or its associated companies may have the right to grant licenses. Except with the consent of the grantor of any license hereunder, no such license shall be under patents on inventions made more than five (5) years after the effective date of the license, but the applicant may make successive applications for licenses. Each grant of a license hereunder shall be for the unexpired terms of the patents under which such license is granted, or for such lesser period as the grantee shall elect, and shall include the right to sublicense the grantee's associated companies for so long as they remain associated companies.

The provisions of this subsection (A) requiring the defendants to grant royalty-free licenses under certain patents shall not be deemed to constitute a finding, determination or admission that such patents are without value or that the defendants are not entitled to full damages and an injunction in the case of infringement of any such patent by any unlicensed person.

(B) Upon receipt of a written request for a license under the provisions of this Section, the defendant to whom such request is addressed shall advise the applicant in writing of the royalty, if applicable, which it deems reasonable therefor, and also of such licenses as defendants may specify under subsection (A) above. If the parties are unable to agree within ninety (90) days upon reasonable royalties or any other terms, the applicant or such defendant may apply to this Court for the determination of reasonable royalties and other terms, and the defendants shall, upon filing or receipt of notice of the filing of such application to this Court, promptly give notice thereof to the plaintiff. In any such proceeding the burden of proof shall

be on the defendant to establish the reasonableness of royalties or other terms requested by it, and on the applicant to establish the reasonableness of royalties or other terms requested by the applicant. Pending final determination of the foregoing, the applicant or said defendant may apply to this Court to fix interim royalty rates and other interim terms and conditions. If this Court fixes such interim rates, terms, and conditions, such defendant shall then tender and the applicant may then accept an agreement under which licenses shall be granted, in accordance with such interim determination, providing for the periodic payment of royalties, if applicable, at such interim rates for any manufacture, use, or sale under the patents involved. If the applicant fails to accept such license agreement or fails to pay interim royalties in accordance therewith such action shall be grounds for the dismissal of his application.

(C) The defendants are each enjoined and restrained from including in any license granted by them any restriction or condition whatsoever limiting the exercise of the rights granted thereby except that the license may be personal and non-transferable and may be conditioned on (1) payment of a reasonable royalty, if applicable, which shall be non-discriminatory as between licensees whose licenses are granted subsequent to the date of this Final Judgment, other than defendants' associated companies, but the royalty provisions of agreements under which licenses are exchanged and royalties are adjusted or eliminated to reflect a bona fide estimate of the values of such licenses shall not be deemed to discriminate between licensees, nor shall the bona fide compromise of claims for accrued royalty be deemed to be discriminatory, (2) subjection, to any grant of licenses and rights by applicant to the defendants, of patents of any company of which applicant is a subsidiary and subsidiaries of any such company and of patents on inventions made in the course of their employment, after the effective date of the license agreement, by employees of any such company, applicant or any of its subsidiaries employed to do research, development or other inventive work, and (3) such other terms as this Court shall

approve upon application by the defendants and notice to the plaintiff. If the applicant shall so request, any agreement in which licenses are exchanged between applicant and defendants shall fix a reasonable royalty for each license, where applicable, rather than providing for the adjustment or elimination of royalties.

(D) Each license agreement executed pursuant to this Section X shall contain, if the licensor so requests, reasonable provisions requiring the licensee to keep records, submit royalty statements and give appropriate license notices, and for periodic inspection of the books and records of the licensee by an independent auditor or any person acceptable to the licensee.

(E) Each license agreement executed pursuant to this Section X shall provide:

(1) That the licensee upon giving written notice to the licensor may cancel any such license for any specified equipment, but subject to paying accrued royalties.

(2) If any licensee requests, that such licensee may at any time surrender its license under any specified patent or patents identified by number by written notice to the licensor, but subject to paying accrued royalties. If any licensee requests, the license agreement shall also provide that upon such surrender the royalty rates shall be renegotiated if requested by the licensee in writing, and if there is a material difference between the reasonable value of the licenses granted to such licensee, including the patents affected by such surrender, and the reasonable value of such licenses without such patents, then such rates shall be reduced by an amount representing such difference. In event of disagreement whether a reduction should be allowed or the amount thereof, the matter may be determined in the manner set forth in subsection (B) of this Section X.

(3) If any licensee requests, a royalty-free grant of immunity under all foreign patents owned or controlled by the licensor or its subsidiaries relating to the sale or use abroad of

equipment manufactured under the license granted pursuant to this Section X.

(F) Each licensee of either defendant under a license agreement in effect at the date of this Final Judgment may cancel any licenses granted to it and its associated companies under such agreement by written notice to the licensor which shall terminate the obligation to pay royalty under the license agreement with respect to any equipment not manufactured, sold, leased or put into use under such licenses prior to such notice. Within sixty (60) days from the date of this Final Judgment, defendants shall mail a copy of the provisions of this Section X to all such existing licensees.

(G) The defendants are each enjoined and restrained, except where this Court upon application by a defendant and notice to the plaintiff shall find good cause therefor, from directly or indirectly:

(1) acquiring any license, grant of immunity or similar right under patents unless such license, grant of immunity or similar right shall be non-exclusive;

(2) disposing of any patents, or rights thereunder, so as to deprive defendants of the power to grant or cause to be granted licenses as required under this Section X unless it be a condition of such disposition that the transferee shall observe the provisions of this Section X with respect to the patents and rights so acquired and shall file with this Court, prior to such disposition, an undertaking to this effect; provided, however, that this subsection (G)(2) shall not be deemed to apply to (a) any transfer of patents or rights thereunder to the plaintiff or any agency thereof, or (b) a disclaimer, or a concession or other grant in interference proceedings; or

(3) granting or receiving any right to grant sublicenses under patents except to the grantee's associated companies for so long as they remain associated companies.

XI.

Western is ordered and directed, upon written request of any person, to furnish to such person a list, prepared as of January 1 of the year in which the request is made, of unexpired patents owned by either defendant or its subsidiaries, identified with the classification of the United States Patent Office on the date of issue of such patents.

XII.

The defendants are each enjoined and restrained from acquiring, directly or indirectly, title to any patent owned or controlled by any person other than Companies of the Bell System and employees thereof, except where this Court, upon application by either defendant and notice to the plaintiff, shall find that otherwise the defendant could not obtain rights under the patent or that the only terms upon which the defendant could obtain non-exclusive licenses under said patent are unreasonable, provided that nothing in this Section XII shall be construed to prohibit the acquisition of patents on inventions made by other persons pursuant to any research or development contract with any Company of the Bell System.

XIII.

The defendant A T & T is enjoined and restrained from receiving from the defendant Western any payment of patent royalty in respect of the manufacture, lease or sale of equipment by Western to the Bell Operating Companies.

XIV.

(A) The defendants are each ordered and directed, upon written application at any time and from time to time, to furnish to any person domiciled in the United States and not controlled by foreign interests, licensed pursuant to Section X of this Final Judgment under any patents of either of the defendants, technical information relating to equipment specified in such application, to the extent and upon the terms hereinafter set forth.

(B) The technical information so to be furnished shall be information relating to equipment manufactured by Western for sale or lease to Bell Operating Companies or A T & T for which the applicant is licensed pursuant to Section X of this Final Judgment, and shall consist, to the extent that the defendants shall have, and have the legal right to furnish, the same, of manufacturing drawings and specifications of the materials and parts comprising such equipment, and manufacturing drawings and specifications covering the assembly, wiring and acceptance test requirements of such equipment.

(C) The defendants are each enjoined and restrained from including in any agreement, under which technical information is furnished pursuant to this Final Judgment, any restriction or condition whatsoever limiting the exercise of the rights thereby granted to use such information, except that the right to use such information may be personal and non-transferable and may be conditioned on (1) payment of a reasonable charge or charges which shall be non-discriminatory as between recipients of such information pursuant to application made hereunder, other than defendants' associated companies, (2) the furnishing by an applicant to Western, upon payment of a reasonable charge or charges therefor, of its own technical information of the character and scope of that furnished by Western, but only respecting equipments for which the applicant has licensed defendants pursuant to Section X of this Final Judgment, and (3) such other restrictions and conditions as this Court shall approve upon application by either defendant and notice to the plaintiff.

Defendants' obligation to furnish technical information in any case shall be subject to such restrictions as may be imposed at any time by any department or agency of the plaintiff for reasons of national security.

(D) The reasonable charge or charges permitted by subsection (C) of this Section XIV shall be designed to reimburse the defendants or the applicant for the cost of gathering and reproducing the information furnished and for that proportion, if any, of the development expense that is reasonable and is

properly allocable to the class of equipment with respect to which the information is being furnished. The amount by which such charge or charges collected by defendants shall exceed the cost of gathering and reproducing such information shall be credited to the development and related engineering expense accounts of Western.

(E) Each agreement under which technical information is furnished pursuant to this Final Judgment shall contain, if the party furnishing such information shall so request, reasonable provisions requiring the recipient of such information to keep records, submit statements respecting charges, keep such technical information confidential, and use such technical information only for manufacture pursuant to the license granted to the recipient of such information under Section X of this Final Judgment, and providing for periodic inspection of the books and records of such recipient by an independent auditor or any person acceptable to such recipient.

(F) A party shall not be deemed, in connection with the furnishing of technical information pursuant to this Final Judgment, to have given any warranty against infringement of patents of others, or any warranty of success in connection with the use of such information.

(G) In the event of disagreement as to the amount of the charge or charges payable under this Section XIV, the matter may be determined in the manner set forth in subsection (B) of Section X of this Final Judgment.

## XV.

(A) The defendants are each enjoined and restrained from making, performing, enforcing, or adhering to any contracts or agreements under which fields of manufacture, sale or distribution of any equipment are divided with others, provided that, subject to other provisions of this Final Judgment, an exchange of non-exclusive licenses and rights under patents, without more, between the defendants and others shall not be deemed to divide fields of manufacture, sale or distribution of equipment.

(B) The defendants are each enjoined and restrained from performing or enforcing any term or provision of any contract or agreement that (1) makes exclusive any licenses or other rights under patents, or (2) grants to one party the right to sue for infringement of the patents of another party.

(C) The defendants are each enjoined and restrained from enforcing any restriction or condition on any licenses or other rights under patents granted by either of them that (1) imposes maximum quantity or dollar limitations, or (2) restricts sales to designated customers (except where sales are limited to subsidiaries, under existing licenses, or to the plaintiff), or (3) restricts the price at which licensed equipment may be sold.

## XVI.

For the purpose of securing compliance with this Final Judgment, duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to the principal office of either defendant, be permitted (1) reasonable access during the office hours of said defendant to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of said defendant relating to any matters contained in this Final Judgment and (2) subject to the reasonable convenience of said defendant and without restraint or interference from it, to interview officers or employees of said defendant, who may have counsel present, regarding such matters, and upon request said defendants shall submit such written reports as might from time to time be reasonably necessary to the enforcement of this Final Judgment. No information obtained by the means provided in this Section XVI shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of such Department, except in the course of legal proceedings in which the United States is a party for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

## XVII.

Jurisdiction is retained for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, or the modification or termination of any of the provisions thereof or for the enforcement of compliance therewith or for the punishment of violations thereof. Upon any such application by the plaintiff, the plaintiff shall be deemed to have made a sufficient showing of a change in circumstances warranting appropriate modification of this Final Judgment if it shall show elimination hereafter, in a substantial number of states, of public regulation of charges for common carrier communications services.

Jurisdiction is further retained for the purpose of enabling the plaintiff to apply to this Court at any time, without the necessity of showing any change in circumstances, for orders under this Final Judgment:

(a) requiring sales, at non-discriminatory prices, of any telephone equipment manufactured by Western or its subsidiaries to independent telephone operating companies, or prohibiting or limiting sales of such equipment to such companies; and

(b) requiring that any equipment manufactured by Western or its subsidiaries that is used by A T & T or any Bell Operating Company in furnishing a common carrier communications service, other than telephone equipment, shall be sold at non-discriminatory prices to any person lawfully engaged in furnishing such a service in competition with them or in furnishing message telegram service, for use by such person in furnishing any such service; and

(c) requiring that A T & T shall, and shall cause its subsidiaries to, continue to lease, to common carriers engaged in the message telegram business, on reasonable terms, circuits required by such carriers for use in their business, to the

extent that such circuits shall be reasonably available without further construction.

Dated: January 24, 1956

/s/ THOMAS F. MEANEY
Thomas F. Meaney
United States District Judge

## APPENDIX A

Bell Telephone Company of Nevada
Illinois Bell Telephone Company
Indiana Bell Telephone Company
Michigan Bell Telephone Company
New England Telephone and Telegraph Company
New Jersey Bell Telephone Company
New York Telephone Company
Northwestern Bell Telephone Company
Southern Bell Telephone and Telegraph Company
Southwestern Bell Telephone Company
The Bell Telephone Company of Pennsylvania
The Chesapeake and Potomac Telephone Company
The Chesapeake and Potomac Telephone Company of Maryland
The Chesapeake and Potomac Telephone Company of Virginia
The Chesapeake and Potomac Telephone Company of West Virginia
The Cincinnati & Suburban Bell Telephone Company
The Diamond State Telephone Company
The Mountain States Telephone and Telegraph Company
The Ohio Bell Telephone Company
The Pacific Telephone and Telegraph Company
The Southern New England Telephone Company
Wisconsin Telephone Company

Supreme Court, U.S.
FILED
DEC 30 1982
ALEXANDER L. STEVAS
CLERK

No. 82-953

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1982

TANDY CORPORATION,
*Intervenor/Appellant,*
v.
UNITED STATES OF AMERICA,
and
WESTERN ELECTRIC COMPANY, INC., AND
AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
*Appellees.*

**On Appeal From The United States District Court For The District Of Columbia**

## APPELLANT'S BRIEF IN OPPOSITION TO MOTIONS TO AFFIRM

MALCOLM R. PFUNDER, *Counsel of Record*
JOHN T. MASTERSON, JR.
HAMEL, PARK, MCCABE & SAUNDERS
888 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 835-8000

GEORGE A. KUHNREICH
Tandy Corporation
One Tandy Center
Fort Worth, Texas 76102
*Counsel for Intervenor/Appellant*

December 30, 1982

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

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NO. 82-953

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In The

**SUPREME COURT OF THE UNITED STATES**

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October Term, 1982

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TANDY CORPORATION,

Intervenor/Appellant,

v.

UNITED STATES OF AMERICA

and

WESTERN ELECTRIC COMPANY, INC., and

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,

Appellees.

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On Appeal From The United States District Court For The District Of Columbia

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# APPELLANT'S BRIEF IN OPPOSITION TO MOTIONS TO AFFIRM

Pursuant to Rule 16.5 of the Supreme Court Rules, Intervenor/appellant Tandy Corporation[1/] submits this brief in opposition to the Motions to Affirm filed by the Department of Justice and by American Telephone and Telegraph Co., et al. Nothing in these motions diminishes the necessity for plenary review of the issues raised in Tandy's Jurisdictional Statement. United States v. E. I. duPont de Nemours and Co., 366 U.S. 316, 323 (1961). Nor is the nature

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1/ Hereinafter referred to as "Tandy." A listing of all parent companies, subsidiaries and affiliates of Tandy, as required by Rule 28.1, appears on the first page of the Application of Tandy Corporation for an Extension of Time in which to Docket Appeal, filed with this Court on November 17, 1982 (No. A-449).

of the required review any different because a consent decree is involved.2/

Phone Center Stores

The District Court erred in holding that the consent decree proposed by the Justice Department and defendant AT&T satisfied the public interest standard of the Tunney Act. Specifically, the decree fails to provide a meaningful remedy for AT&T's long-standing dominance of the customer premises equipment (CPE) industry -- dominance which is explicitly recognized

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2/ The Justice Department points out that several cases cited by Tandy's Jurisdictional Statement "involved litigated judgments where the judge's exercise of discretion in fashioning the various elements of relief was at issue." (Motion to Affirm at 27 n.33). These were precisely the kinds of cases which the District Court believed "form the most relevant yardstick for determining whether the proposed consent decree will further antitrust policies . . . ." (J.S. App. at 29-30). Neither the Department nor AT&T has previously objected to the Court's reliance on these cases.

by both the Department of Justice (Motion to Affirm at 13) and the District Court (J.S. App. at 98). AT&T's divestiture of the BOC's, while necessary to the creation of a competitive CPE market, is not by itself sufficient to achieve this essential goal.

The District Court held that more was required. The Court determined that it was not in the public interest to keep the BOC's out of the business of marketing CPE, because of "the very substantial contribution these companies could make to vigorous competition in the customer premises equipment market." (J.S. App. at 108). It found that the divested BOC's "are more likely than any other competitive entity to provide an effective counterbalance to AT&T's market strength and thereby to promote a genuinely competitive

market." (J.S. App. at 109). The Court thus equated creation of a genuinely competitive CPE market with the public interest standard of the Tunney Act. But it then approved a decree which did not provide that remedy and thus did not, even when viewed as a whole, satisfy the standard it had adopted.3/

The decree as presently framed allows AT&T to retain its dominant position in CPE marketing by retaining its nationwide

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3/ Both AT&T and the Department of Justice emphasize that the decree approved by the District Court was the product of compromise and urge this Court to evaluate criticisms of the decree in that light. (AT&T Motion to Affirm at 25-26; DOJ Motion to Affirm at 25-26). Indeed, that is precisely what the Tunney Act mandates; the reason for its enactment was to require that any such compromise be subjected to judicial scrutiny and satisfy a public interest standard. Here, however, the bargain struck by the parties unacceptably compromised the public interest and therefore should not have been approved by the District Court without appropriate modification.

distribution system of "Phone Center" retail outlets, which have to date been owned and operated by the BOC's.[4/] Effective January 1, 1983, AT&T will take over from the BOC's the sale of all new CPE. Prior to early 1984 the BOC's cannot even begin meaningful preparations for entry into CPE retailing, since under the decree all assets related to that business must be delivered to AT&T at the time of divestiture. AT&T, with the District Court's blessing, plans simply to transfer the entire Phone Center retailing operations

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4/ The Department of Justice argues that divestiture of the BOC's will remove AT&T's ability to engage in anticompetitive conduct in the equipment market. (Motion to Affirm at 27). But even the District Court held that divestiture of the BOC's alone was insufficient to satisfy the public interest standard of the Tunney Act and therefore removed the prohibition on the BOC marketing of CPE. (J.S. App. at 109). However, what is needed to make competition effective in this market is divestiture of AT&T's Phone Center Stores to the BOC's.

from the BOC's to its new subsidiary, American Bell, thereby retaining its market position intact.

The decree thus cripples the BOC's in two ways. Not only does it force them to abandon a business in which they have been significant factors and to wait at the starting line for at least a year after the gun has gone off, but it delivers to AT&T a fully operational, nationwide retailing system, along with accumulated customer goodwill, store locations, and experienced marketing personnel. It is conceivable, as the District Court indicates (J.S. App. at 108 n.248), that some or all of the divested BOC's will nevertheless decide sometime in 1984 or later to begin the process of opening retail locations to sell CPE directly to consumers. It is also conceivable that, in a matter of years, these

efforts may be sufficiently successful to provide some meaningful competition to "counterbalance . . . AT&T's market strength." But the inevitable delay and the unnecessary handicap placed upon the BOC's by the decree approved by the District Court makes realization of this remedy distant and uncertain at best.5/

The very cases cited with approval by the District Court require stronger relief. (See J.S. App. at 30 & nn.79, 80.) Tandy agrees with the District Court's statement that

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5/ Contrary to the assertion of the Justice Department (Motion to Affirm at 27), there is therefore a strong "competitive basis" for forcing AT&T to divest its Phone Center Stores.

> A decree must "break up or render impotent the monopoly power found to be in violation of the Act," that is, it must leave the defendant without the ability to resume the actions which constituted the antitrust violation in the first place. For these reasons, the decree should not be limited to past violations; it must also effectively foreclose the possibility that antitrust violations will occur or recur.

(J.S. App. at 30, footnote omitted). Because the decree approved by the District Court does not provide for BOC retention of their Phone Center Stores, it cannot satisfy that standard.

> Divestiture or dissolution must take account of the present and future conditions in the particular industry as well as past violations. It serves several functions: (1) It puts an end to the combination or conspiracy when that is itself the violation. (2) It deprives the antitrust defendants of the benefits of their conspiracy. (3) It is designed to break up or render impotent the monopoly power which violates the [Sherman] Act.

Schine Chain Theatres, Inc. v. United States, 334 U.S. 110, 128-29 (1948). Only AT&T's divestiture of the Phone Center Stores can adequately assure the prompt realization of the kind of competition in CPE marketing required by the public interest, as the District Court has itself defined it.6/

Patent Licensing

The District Court also erred in approving the termination of the compulsory patent licensing provisions which had been imposed by the 1956 Western Electric

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6/ AT&T's argument that "appellate courts are 'powerless to rewrite the provisions of a settlement agreement' lest they change a provision that was essential to one party's assent" (Motion to Affirm at 26) misses the point. Tandy contends that the decree approved by the District Court fails to satisfy the Tunney Act's public interest standard. If that contention is sustained on appeal, the parties themselves would have to determine whether to rewrite their consent decree in such a way that the statutory standard would be met.

consent decree. The record before the District Court offered no basis for its summary determination that a consent decree eliminating those requirements satisfied the Tunney Act's public interest standard.7/

Neither AT&T nor the Department of Justice adequately respond to this point in their respective motions to affirm.8/ Instead, each raises issues that are only peripheral and diversionary.

The compulsory licensing requirements in the 1956 decree were directly responsive to allegations of patent abuse

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7/ Whether this action is regarded as a modification of an existing decree or as part of a new settlement, the parties have the burden of demonstrating, and the District Court must find, that the proposal is in the public interest. J.S. App. at 25 n.67; Tandy Jurisdictional Statement at 13.

8/ AT&T relies primarily on argument by adjective, rather than on substance, labeling Tandy's position "false," "spurious," "inconsistent," "frivolous" (three times), and "insubstantial."

contained in the Justice Department's 1949 antitrust complaint.9/ Attorney General Brownell, in announcing the Western Electric settlement on January 24, 1956, stated:

> The patent relief obtained in this decree is a long stride forward in the efforts of the Department of Justice to destroy the unlawful divisions of patent rights heretofore existing for many years in electronics.10/

The trial of the 1974 case did not deal with patent issues. The parties did not propose to the Court the elimination of the 1956 decree provisions during discovery or

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9/ AT&T attempts to characterize these provisions as being imposed "in exchange for preserving the integrated Bell System." (Motion to Affirm at 29, emphasis in original). AT&T seems to confuse an explanation of why compulsory licensing requirements may have been acceptable to AT&T with the reasons why they were imposed.

10/ Reprinted in Consent Decree Program of the Department of Justice, Hearings before the Antitrust Subcommittee of the House Committee on the Judiciary, 85th Cong. 2nd Sess. (1958) at p. 1865.

trial of the case. In fact, it appears that the Government suit was tried on the assumption that the 1956 decree would remain in place. Thus the parties had no occasion to develop, and the District Court had no occasion to hear and consider, evidence relating to possible elimination of the licensing provisions.11/ The Court simply had no record before it relating to patent use or abuse, the competitive impact of the licensing provisions, the likelihood of future antitrust violations relating to patents, or any of the information which would have permitted it to consider whether elimination of those requirements was in the public interest. Thus the Court's

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11/ The Justice Department's speculation concerning the likelihood of continued licensing by AT&T (Motion to Affirm at 28) is wholly unsupported and is undermined by AT&T's fierce opposition to retention of any obligation to license its patents.

"extensive knowledge of the telecommunications and related industries" (DOJ Motion to Affirm at 28 n.34) is unrelated to the patent licensing issue.

AT&T attempts to raise a diversionary issue by suggesting that Tandy failed to comply with the District Court's request that any person proposing an evidentiary hearing outline in detail its content, duration, and the like. (Motion to Affirm at 28). In its brief filed with the District Court, Tandy pointed out the inadequacy of the parties' justification of their proposed consent decree. Brief of Tandy Corporation Regarding Absence of Restrictions on AT&T (filed June 14, 1982) at 14-19. The parties' failure to satisfy their burden of demonstrating that elimination of compulsory patent licensing was in the public interest should have precluded the

District Court from approving the proposed decree. A variety of techniques, including a request for evidentiary hearings, might have been employed by the parties to cure this defect. The District Court could not supply an adequate record without the assistance of the parties, and its memorandum order of May 25, 1982, surely did not contemplate that Tandy as a commentor would be in a position to do so.

The issues listed in Tandy's Jurisdictional Statement (at 14) were merely suggestive of the kinds of considerations that might bear upon an adequately supported public interest determination. The problem is complex, and the issues, difficult, as AT&T in effect admits (Motion to Affirm at 29). But the parties and the District Court cannot for that reason ignore them and instead rely solely on conclusory

predictions about the likely future course of research and development in the telecommunications industry. (DOJ Motion to Affirm at 27-28).12/

Even if AT&T were correct in stating that the premise underlying the 1956 decree provisions "was that patents funded in whole or in part by revenues from franchised monopolies should be made available to all" (Motion to Affirm at 29),13/ divestiture of the BOC's does not cause that premise to "vanish." The nearly 10,000

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12/ While it may be true that evidentiary hearings are optional under the Tunney Act (DOJ Motion to Affirm at 28), that is not the issue. The issue is whether the District Court had an adequate evidentiary basis for its determination that mandatory patent licensing could be eliminated. Tandy contends that it did not.

13/ If this premise is correct, the District Court's treatment of the patent licensing issue (J.S. App. at 78-79) seems deficient in failing to retain mandatory licensing requirements at least for existing and pending patents for some period of time.

patents presently held by AT&T have all been funded from revenues generated by its franchised monopolies. Moreover, even after divestiture AT&T will continue to fund its research and development activities through its intercity service and telecommunications equipment manufacturing and marketing activities. AT&T's dominance of these markets (J.S. App. at 98) provides it with monopoly revenues, which will continue well into the future. The premise for mandatory patent licensing will thus last until AT&T's dominant market position has been dissipated by effective competition.

Thus, it is not correct to say that retention of mandatory patent licensing requirements would place AT&T at a competitive disadvantage. (AT&T Motion to Affirm at 29; DOJ Motion to Affirm at

28). So long as AT&T continues to reap the benefits of its dominant position in the intercity and CPE markets and its prior ownership of local exchange monopolies, it is not unreasonable to require that patents funded with revenues from these operations be made available to the public upon payment of reasonable royalties. Elimination of mandatory patent licensing prior to the emergence of "genuinely competitive" markets (J.S. App. at 109) would instead place AT&T's competitors at an unfair disadvantage and tend to perpetuate AT&T's market dominance.

## CONCLUSION

For the above reasons, Tandy respectfully requests this Court either to accept its appeal and to conduct a plenary review, with briefs and oral argument, of the issues

raised therein, or to remand this appeal to the Court of Appeals for such review.

Respectfully submitted,

MALCOLM R. PFUNDER,

Counsel of Record

JOHN T. MASTERSON, JR.

HAMEL, PARK, McCABE & SAUNDERS
888 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 835-8000

GEORGE A. KUHNREICH

Tandy Corporation
One Tandy Center
Fort Worth, Texas 76102

Attorneys for Intervenor/ Appellant Tandy Corporation

December 30, 1982